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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 SUSAN R. CLOSSON, *et al.*,

11 Plaintiffs,

12 v.

13 RECONTRUST COMPANY, *et al.*,

14 Defendants.
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Case No. 2:11-CV-00146-KJD-RJJ

ORDER

16 Presently before the Court is Defendants' Motion to Dismiss (#12). Plaintiffs filed a
17 response in opposition (#23) to which Defendants replied (#24). Plaintiffs then filed a Sur-reply
18 (#25) without leave of the Court. Defendants replied (#29) to the sur-reply. Plaintiffs then filed a
19 second Sur-reply (#31).

20 **I. Background**

21 In August 2003, Plaintiffs refinanced property that they had purchased at 5450 Manteca
22 Circle, Las Vegas, NV 89118 ("the Property"). In order to complete the transaction, Plaintiffs
23 obtained a \$404,000.00 loan from Countrywide Home Loans, Inc. which they secured with a Deed
24 of Trust in favor of Countrywide. That Deed of Trust designated Defendant Mortgage Electronic
25 Registration Systems, Inc. ("MERS") as beneficiary and nominee of the lender. The Deed of Trust
26 also named CTC Real Estate Services, Inc. as Trustee. The Deed of Trust allowed the Lender to

1 foreclose if Plaintiffs failed to make payments under the Note, and granted broad powers to MERS to
2 act on the Lender's behalf, including the power to foreclose, or take any action required of Lender, its
3 successors or assignees.

4 Plaintiffs defaulted on their obligations in December 2008. Defendant Reconstruct, as agent
5 for beneficiary, initiated foreclosure proceedings by recording a Notice of Default and Election to
6 Sell on April 23, 2009. On April 24, 2009, MERS substituted Reconstruct as the trustee under the
7 Foreclosing Deed of Trust. Plaintiffs did not cure their default, and Notice of Trustee's Sale was
8 recorded on July 28, 2009, noticing a sale date of August 14, 2009. However, the sale was
9 postponed and noticed four additional times through April 11, 2011.

10 On January 27, 2011, Plaintiffs filed the present complaint alleging claims against
11 Defendants for violations of the Real Estate Settlement Practices Act ("RESPA"), fraud, breach of
12 contract, fraudulent foreclosure, quiet title, and violations of the Fair Debt Collection Practices Act
13 ("FDCPA"). Defendants have now moved to dismiss all of Plaintiffs' claims.

14 II. Standard for a Motion to Dismiss

15 In considering a motion to dismiss, "all well-pleaded allegations of material fact are taken as
16 true and construed in a light most favorable to the non-moving party." Wyler Summit Partnership v.
17 Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
18 Consequently, there is a strong presumption against dismissing an action for failure to state a claim.
19 See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted).

20 "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
21 as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S. Ct. 1937,
22 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the
23 context of a motion to dismiss, means that the plaintiff has pleaded facts which allow "the court to
24 draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

25 The Iqbal evaluation illustrates a two prong analysis. First, the Court identifies "the
26 allegations in the complaint that are not entitled to the assumption of truth," that is, those allegations

1 which are legal conclusions, bare assertions, or merely conclusory. Id. at 1949-51. Second, the
2 Court considers the factual allegations “to determine if they plausibly suggest an entitlement to
3 relief.” Id. at 1951. If the allegations state plausible claims for relief, such claims survive the motion
4 to dismiss. Id. at 1950.

5 III. Analysis

6 A. RESPA

7 Most of Plaintiffs’ claims under RESPA are barred by either its one-year or three-year statute
8 of limitations, 12 U.S.C. § 2614. Claims under both sections 2607 and 2608 must be brought within
9 one-year of the alleged violation. Claims brought under section 2605 must be brought within three
10 years of the alleged violations. Therefore, all claims that arose during the origination of the loan, its
11 closing, and the alleged transfer of the loan servicing are barred by the three-year statute of
12 limitations. The only claims alleged in the complaint that are not barred by the statute of limitations
13 are Plaintiffs’ allegations that Defendant BAC Home Loans Servicing LP failed to appropriately
14 respond to their “Qualified Written Request” (“QWR”).

15 While section 2605 does require a servicer to respond to written correspondence that includes
16 enough information for the servicer to identify the name and account of the borrower, the request
17 must include a statement of the reasons for the belief of the borrower that the account is in error.
18 Here, the Court finds that Plaintiffs have not stated a claim for relief, because Plaintiffs’ thirty-one
19 (31) page request does not include a statement that puts the servicer on notice of what reasons the
20 account might be in error.

21 Furthermore, even if the overbroad letter was sufficient, Plaintiff has not stated a claim for
22 actual or statutory damages. In reply to the motion to dismiss, Plaintiffs assert that they have
23 “suffered damages to their credit ratings; the title to their property has been clouded and is at risk of
24 losing their home.” However, this statement of damages is too speculative and tangential to the
25 QWR to state a claim. Plaintiffs’ credit rating and risk of loss of their home is directly related to
26 their failure to make payments on the loan. Furthermore, allegations of risk to credit without

specifically cited pecuniary damage is too speculative to state a claim. See Moon v. Countrywide Home Loans, Inc., 2010 WL 522753, *5 (D. Nev. Feb 9, 2010); Katz v. Dime Sav. Bank, 992 F. Supp. 250 (W.D. N.Y. 1997)(QWR claim requires allegations of actual denial of credit, actually inability to sell or refinance home, not just what “might have” befallen mortgagor), compare In re Payne, 386 B.R. 614 (Bkrptcy. D. Kan. 2008)(debtors entitled to \$350.00 in out-of-pocket expense for failed refinance where servicer’s failure to respond to QWR was cause of failed refinance). Finally, Plaintiffs’ allegation that BAC failed to respond to its sole QWR is insufficient to establish a “pattern or practice” of RESPA violations supporting statutory damages. See Morris v. Bank of America, 2011 WL 250325, *5, n.9 (N.D. Cal. Jan. 26, 2011). Accordingly, the Court dismiss Plaintiffs’ claims for violation of RESPA.

B. Plaintiffs’ Second, Third, Fourth, Fifth, and Sixth Causes of Action

Though Plaintiffs label these causes of action as fraud, breach of contract, wrongful foreclosure, quiet title, and violations of the FDCPA, the substance of Plaintiffs’ allegations is that Plaintiffs’ home is being wrongfully foreclosed on because the parties filing the statutorily required notices do not have authority to do so and that MERS has neither the authority to transfer the beneficial interest in the property nor the authority to act on behalf of the party that does have the beneficial interest. Plaintiffs allege that these actions are fraudulent, breach the contracts at issue in this action and result in wrongful foreclosure requiring Plaintiffs to seek to quiet title. However, Plaintiffs’ assertion that MERS did not have authority to act is incorrect.

Under Nevada law, the foreclosure process is commenced by the recording of a notice of default by the beneficiary, successor in interest of the beneficiary, or trustee. N.R.S. § 107.080(2)(c). After at least three months have elapsed, the trustee or other person authorized to make the sale under the terms of the deed of trust shall give notice of sale in accordance with the posting requirements for residential foreclosures. N.R.S. § 107.080(4). A foreclosure sale may be declared void if the trustee or other person authorized to make the sale did not substantially comply with the foreclosure statutes. N.R.S. § 107.080(5). Here, Plaintiffs allege that Recontrust was not authorized

1 to foreclose, i.e. record the Notice of Default, upon the Property because MERS was not authorized
2 to transfer the beneficial interest in the mortgage loan. See Complaint, ¶¶ 90-95, 101-102, 111-27.

3 The Deed of Trust designates MERS as a “nominee for the Lender and Lender’s successors
4 and assigns.” See Plaintiffs’ Complaint (Doc. No. 1, Ex. 1, p. 18 of 135). Plaintiffs allege that
5 MERS’ authority as a “nominee” is limited to acting as a form of agent for the lender, which
6 according to Plaintiffs, does not allow MERS to assign, transfer or otherwise convey any interest in
7 the note or Deed of Trust to any other entity.

8 Black’s Law Dictionary defines “nominee” as “[a] person designated to act in place of
9 another, [usually] in a very limited way.” Weingartner v. Chase Home Finance, LLC, 702 F.Supp.2d
10 1276, 1279 (D. Nev. 2010). In short, “a nominee is an agent with limited powers, akin to a special
11 power of attorney.” Id. This applies to cases such as the present one, where an entity is nominated on
12 a deed of trust by the holder of a promissory note, with the limited role of administering the deed of
13 trust on the holder’s behalf. Id. This definition indicates that a “nominee is a kind of agent working
14 to the benefit of another.” Id. In the present case, “that other person is the holder of the promissory
15 note or its assigns.” Id. Therefore, based on this definition, MERS, in its capacity as nominee, has the
16 right to substitute a new trustee on the Deed of Trust. See id. at 1280.

17 Plaintiffs correctly note that MERS is not a beneficiary to the Deed of Trust and further allege
18 that MERS has no standing to convey or transfer assignments. Courts within this jurisdiction have
19 addressed the conflation of the terms “nominee” and “beneficiary” in boilerplate provisions within
20 deeds of trust such as the one at issue here. These courts have concluded that:

21 Although MERS is not in fact the beneficiary, the attempt to name it as
22 such...indicates an intent to give MERS the broadest possible agency on
23 behalf of the owner of the beneficial interest in the underlying debt. Such
24 agency would include the ability to sell the interest in the debt.

25 Villa v. Silver State Fin. Servs., 2011 WL 1979868, at *1 (D. Nev. 2011). Furthermore, the Deed of
26 Trust explicitly states:

Borrower understands and agrees that MERS holds only legal title to the
interests granted by Borrower in this Security Instrument, but, if necessary

1 to comply with law or custom, MERS (as nominee for Lender and
2 Lender's successors and assigns) has the right: to exercise any and all of
3 those interests, including, but not limited to, the right to foreclose and sell
the Property; and to take any action required of Lender, including but not
limited to, releasing and canceling this Security Instrument.

4 See Defendants' Motion to Dismiss (Doc. No. 1, Ex. 1, p. 21 of 135). This language is "clear
5 enough... to indicate that the parties intended MERS would be able to transfer the beneficial interest
6 in the underlying debt directly." Villa, 2011 WL 1979868, at *1 (D. Nev. 2011). Furthermore, "it is
7 even more clear that MERS may directly transfer the interest in the deed of trust itself..." Smith v.
8 Community Lending, Inc., 2011 WL 1127046, at *2 (D. Nev. 2011). Accordingly, Plaintiffs have
9 failed to allege any specific defect in the current foreclosure documents or proceedings prohibiting
10 foreclosure under Nevada law.

11 Plaintiffs' allegation that foreclosure is improper because Defendants have failed to possess
12 and produce the note to validate the powers vested under the Deed of Trust fails because "defendants
13 do not need to produce the note to the property in order to proceed with a non judicial foreclosure."
14 Clingman v. Somy, 2011 WL 383951, at *2 (D. Nev. Feb. 3, 2011). Case law within this district
15 holds that N.R.S. § 107.080 "does not require a lender to produce the original note or prove its status
16 as a real party in interest, [a] holder in due course, current holder of the note, nominee of the current
17 holder of the note, or any other synonymous status as a prerequisite to nonjudicial foreclosure
18 proceedings." Kwok v. Recontrust Company, N.A., 2010 WL 4810704, at *4 (D. Nev. 2010); see
19 also Ritter v. Countrywide Home Loans, Inc., 2010 WL 3829378, at *3 (D. Nev. 2010) ("[T]he court
20 has consistently held that NRS § 107.080 does not require MERS or any other similar entity to show
21 it is the real party in interest to pursue nonjudicial foreclosure actions.").

22 Plaintiffs' best remedy would have been to seek their right to mediation through Nevada
23 Assembly Bill 149 which amends Chapter 107 by adding a requirement that if the grantor or person
24 holding title of record notifies the trustee that it seeks mediation, the power of sale be stayed until
25 completion of mediation. The mediation requires the beneficiary of the deed of trust or a
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1 representative to appear at the mediation with the original or certified copy of the deed of trust, the
2 mortgage note, and each assignment of the deed of trust or mortgage note. The trustee, or person
3 appearing on the trustee's behalf, must have authority to modify the terms of the loan. See 2009 NV
4 A.B. 149, Nevada Seventy-Fifth Regular Session. The record is silent as to whether Plaintiffs
5 requested their right to mediation. If the opposing parties had failed to produce documentation
6 substantiating their claim to authority to proceed with foreclosure or had otherwise failed to mediate
7 in good faith, Plaintiffs could then have sought relief in state court.

8 In many instances, parties are barred from seeking relief in federal court where they have
9 failed to exhaust all administrative or state law remedies. Though this issue has not been decided in
10 Nevada, there are powerful public policy reasons to require parties to undergo mediation before they
11 file foreclosure related lawsuits. Plaintiffs complain that Defendants acted without authority and the
12 use of MERS deliberately masks the true party with a beneficial interest in the note and Deed of
13 Trust. However, the State of Nevada Legislature saw this problem and created the requirement that
14 parties be given the option to attend a mandatory mediation at which a party with authority to modify
15 the loan be present.

16 The Court concludes that Recontrust acted properly acting as agent for beneficiary and was
17 properly substituted by MERS as trustee, and therefore, the notice of default issued by Recontrust,
18 and the notice of trustee's sale issued by Recontrust as substituted trustee, are valid under Nevada
19 statutes. Plaintiffs have therefore failed to allege any cognizable defect. See e.g. Berilo v. HSBC
20 Mortg. Corp., USA, 2010 WL 2667218, at *4 (D. Nev. 2010) ("[N]othing prevents an authorized
21 agent from recording a notice of default. Nor does Nevada law require a substitution of trustee be
22 recorded prior to a notice of default."). Thus, Plaintiffs' complaint for wrongful foreclosure fails to
23 state a claim.¹ First, the Deed of Trust expressly authorizes MERS to act as nominee for Lender, to
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25 ¹Since the property has not yet been sold at auction, no actionable foreclosure has taken place. A claim to set
26 aside a foreclosure must be brought within ninety (90) to one hundred and twenty (120) days after the foreclosure sale
depending on which part of Nevada statute a plaintiff alleges has been violated.

1 act as beneficiary and “to take any action required of Lender[.]” The Deed of Trust at issue in this
2 action is nearly identical to the one in Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034,
3 1042 (9th Cir. 2011) which found that consumers were not misled about MERS’ role in their home
4 loans.

5 After examining each document the Court may take judicial notice of, the Court can find no
6 deficiency in the assignments of the Deed of Trust, substitutions of Trustee, or notices required in
7 Nevada statute. Each party that acted was authorized to act as they did by the Deed of Trust, Note,
8 and by state statute. Furthermore, Plaintiffs’ claims regarding securitization of the Note and the
9 involvement of MERS have been foreclosed by Cervantes. Id. at 1044. The Court’s review of the
10 Deed of Trust and judicially noticed, recorded documents demonstrates no defect as alleged by
11 Plaintiffs.

12 Next, Plaintiff’s wrongful foreclosure claims fail, because Plaintiffs do not dispute that they
13 are in default and cannot cure the default. Nevada recognizes the tort claim of wrongful foreclosure
14 where homeowners allege that a lender wrongfully exercised the power of sale and foreclosed upon
15 their property when they were not in default on the mortgage loan. See Collins v. Union Fed. Sav. &
16 Loan Ass’n, 662 P.2d 610, 623 (Nev. 1983). However, Plaintiffs do not dispute their delinquency on
17 the mortgage. Therefore, the Court dismisses Plaintiffs’ claims for wrongful foreclosure, breach of
18 contract, fraud, and violations of the FDCPA.²

19 Plaintiffs’ last claim, to quiet title, must also be dismissed. In Nevada, a quiet title action
20 may be brought “by any person against another who claims an...interest in real property, adverse to
21 the person bringing the action, for the purpose of determining such adverse claim.” N.R.S. § 40.010.
22 In a claim for quiet title “the burden of proof rests with the plaintiff to prove a good title in himself.”
23 Velazquez v. Mortgage Electronic Registration Systems, Inc., No. 2:11-CV-576, slip op., 2011 WL

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25 ²The Court notes that Plaintiffs have failed to respond to many of the arguments in Defendants’ motion to
26 dismiss. Failure to file points and authorities in opposition to a motion to dismiss, constitutes consent to the Court
granting the motion. See Local Rule 7-2(d). Therefore, the Court dismisses any claims that Plaintiffs failed to address,
such as the motion to dismiss the FDCPA claim.

1 1599595, at *2 (D. Nev. Apr. 27, 2011) (quoting Breliant v. Preferred Equities Corp., 918 P.2d 314,
2 318 (Nev.1996)). Since no other party has asserted a competing claim to the title, the Court must
3 dismiss the claim for quiet title.

4 Finally, in Plaintiffs' belated sur-replies, they assert that their claim for fraud is based on
5 defendants statement that the only way they could obtain a loan modification was to not make
6 payments for ninety (90) days. However, this allegation and claim is not made in the complaint.
7 Furthermore, fraud has a higher pleading standard under Rule 9, which requires a party to "state with
8 particularity the circumstances constituting fraud." Fed.R.Civ.P. 9(b). Pleading fraud with
9 particularity requires "an account of the time, place, and specific content of the false representations,
10 as well as the identities of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d
11 756, 764 (9th Cir. 2007).

12 Since the Court has dismissed all claims, Plaintiffs will be granted leave to amend their
13 complaint in accordance with this order. However, Plaintiffs are warned that mere recitation of its
14 previous claims will be insufficient. Any claims alleged in an amended complaint must contain the
15 specificity required by Rule 9 and must include the facts necessary to state a claim as identified by
16 the Court. Plaintiffs' wrongful foreclosure claims are premature, because no foreclosure has taken
17 place. If Plaintiffs reallege claims that the Court has dismissed without facts that state a claim, the
18 Court will sanction Plaintiffs.

19 IV. Conclusion

20 Accordingly, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (#12) is

21 **GRANTED;**

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1 IT IS FURTHER ORDERED that Plaintiffs file an **Amended Complaint** within fourteen
2 (14) days of the entry of this order, failure to do so will result in this action being dismissed with
3 prejudice.

4 DATED this 15th day of March 2012.

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8 Kent J. Dawson
9 United States District Judge
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